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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

**No. 536.**

MAX E. GREENBERG,

*Petitioner,*

*against*

AMERICAN SURETY COMPANY OF NEW YORK,

*Respondent.*

*PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.*

## BRIEF FOR RESPONDENT.

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## BRIEF FOR RESPONDENT.

### Question Presented.

The Act of Congress involved (Act of August 13, 1954, 68 Stat. A160) is a private Act for the relief of respondent. The question presented is:

> Did Congress, by imposing a prohibition against payment of attorney's fees from appropriated as well as other funds of respondent as a condition to its grant of relief, contravene the Fifth Amendment to the Constitution of the United States?

### Summary of Argument.

The petition for a writ of certiorari should be denied because this question has heretofore been determined by this Court and the decision of the New York State Court is in accord with applicable decisions of this Court.

It is the settled policy of Congress to incorporate in private acts for relief of persons with claims against the Government, provisions restricting or prohibiting payment of fees to attorneys for services rendered in connection with such claims. The purpose of these provisions is "to protect just claimants from extortion or improvident bargains, and * * * the Treasury from frauds and imposition." *Calhoun* v. *Massie*, 253 U. S. 170, 173 (1920).

The decision of this Court in *Calhoun* as well as those of other United States Appellate Courts, notably in *Sutherland* v. *New York & Baltimore Transportation Lines*, 43 F. Supp. 94 (S. D. N. Y. 1941) aff'd. on opinion below 125 F. 2d 551 (2nd Cir. 1942) dispose of petitioner's contentions. These and like cases hold that fee provisions in private claim acts are constitutional and prevail over a prior contract for payment of fees even where, as here, payment is sought from unappropriated funds. The basis of these decisions is that Congress, being under no compulsion to recognize such private claims, may do so on such conditions as it deems proper, including the limitation or prohibition of attorney's fees.

That Congress in passing the Act intended to prohibit payment of attorney's fees even from other funds of the respondent is clearly demonstrated by the Act's legislative history (100 Congressional Record 8220-21).

## I.

**The provisions of the Act prohibiting payment of attorney's fees supersede any contract between the parties and proscribe payment from any source whatever.**

The constitutionality of Acts of Congress prohibiting assignment of claims and limiting fees properly chargeable has long been settled. *Calhoun* v. *Massie*, 253 U. S.

170, 173, 174 (1920). In *Calhoun* and *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208 (1919), claimants employed the same attorney to prosecute claims against the government, agreeing to pay him fifty percent of any recovery. Subsequently Congress passed an act providing for payment of the claims. The act, contrary to the fifty percent contingent fee agreements, limited the attorney's fees to twenty percent of the appropriations and made payment or receipt of more a misdemeanor. Not having received the agreed percentages, Calhoun, the attorney, sued for the balance in each case. The claimant in *Calhoun* had assets in addition to the appropriation whereas the claimant in *Capital Trust* did not.

The Court denied recovery and held that Congress has the constitutional power to restrict the fees of an attorney for services in connection with private claim acts, and that such restrictions do not deprive the attorney of property or impair the obligation of his prior contract for the payment of fees in excess of the amount allowed by Congress. In *Calhoun*, the Court also ruled that the limitation proscribed payment of the balance of the agreed fee both from appropriated as well as other funds of the claimant.

The basis of decision in each case is the same (250 U. S. 219; 253 U. S. 176-177). As stated in *Calhoun* at pages 176-177:

> "In view of the past action of Congress limiting attorneys' fees, referred to above, it was at least conceivable when the contract was made that Congress might, as it proved, be unwilling to enact any legislation without assuring itself that the benefits thereof would not inure largely to others than those named in the act. Assent by Calhoun to the insertion in the act of a condition such as this, which he might reasonably have contemplated would be re-

> quired to insure its passage, was, therefore, implied in the contract to aid in securing the legislation."

In *Sutherland* v. *New York & Baltimore Transportation Lines*, 43 F. Supp. 94, aff'd. on opinion below, 125 F. 2d 551 (1942), the United States Courts for the Southern District of New York and the Second Circuit followed *Capital Trust* and *Calhoun*. In *Sutherland*, the language of the fee provision was identical with that at bar, except that there it was a limitation on the amount whereas here it is a prohibition against any payment. The Court limited recovery to the lesser amount fixed by Congress and held that this limitation applied not only to appropriated but also to other funds of the claimant, saying at pages 95-96:

> "And, as I think, very wisely, such limitation should apply regardless of the sources from which such compensation may happen to come. In the light of this concept, there is no need to be astute in endeavoring to define and construe words and phrases in such manner as will frustrate what I believe to be the intention and deliberate purpose of Congress."

The same result was reached in *Nesbit* v. *Frederick Snare Corporation*, 96 F. 2d 535 (C. A. D. C. 1938) cert. den. 305 U. S. 608 (1938) following *Calhoun* and *Capital Trust*.

The fact that in *Calhoun*, *Sutherland* and other cases cited, the condition imposed by Congress was a limitation on the amount rather than a prohibition against payment of any fee, is not a valid distinction. As previously shown, acts appropriating public funds for payment of private claims are a matter of favor, not of right, so that Congress, in providing for payment, may impose whatever conditions it deems best suited to protect the public and the Treasury.

The test of validity is not whether the condition is a limitation or a prohibition but rather the power of Congress to impose the condition.

Concededly, under the authorities cited above, Congress has that power and intended the Act to proscribe payment of attorney's fees from any source unless the rendition of services were revealed to the Judiciary Committee.

Colloquy in the Senate when the Act was there under consideration leaves no doubt as to this intent of Congress (100 Congressional Record 8221):

> "Mr. Magnuson: * * * However, I am wondering whether by cutting out the 10-percent limitation on the payment of lawyers' fees the way might be left open for a lawyer to charge any kind of fee he may desire to charge.
>
> "Mr. Hendrickson: No; the amendments provide that no fee can be paid.
>
> "Mr. Magnuson: Can a claimant pay any fee to a lawyer?
>
> "Mr. Hendrickson: No; nothing at all. He cannot pay anything to a lawyer under these amendments."
>
> * * * * * *
>
> "Mr. Magnuson. * * * If I may use the American Sufety Company as an example, because that company appears as a claimant in a bill now on the calendar, I assume that such a claim naturally would entail a great deal of legal work. Is that correct?
>
> "Mr. Hendrickson. I think so.
>
> "Mr. Magnuson. In a case like that, involving a large sum of money, where some legal services have been rendered, the committee probably would provide for the regular 10 percent limitation on an attorney's fee, or would allow a certain legal fee
>
> "Mr. Hendrickson. If the facts before the committee as to the services rendered were clear, I am

sure the committee would allow a reasonable legal fee."

Petitioner clearly was derelict in his duty to his client, and incidentally, to himself when he failed to disclose to that Committee his contract for a contingent fee and any services he had rendered. His failure to do so not only led the Committee to proscribe any payment to him but it also put his client in criminal jeopardy if it compensated him, since payment in violation of the Act is a misdemeanor. Petitioner's remedy lies with Congress, for, as shown by *Calhoun* v. *Massie*, 253 U. S. 170 (1920) and other authorities cited above, including the Congressional Record, only Congress has the power to grant him relief.

*Davis* v. *Commonwealth*, 164 Mass. 241 (1895) upon which petitioner relies (petition, pp. 15 *et seq.*), was rejected in *Calhoun* v. *Massie*, *supra*, at 181, as pointed out in the minority opinion of McReynolds, J. The plaintiff in *Sutherland* v. *New York & Baltimore Transportation Lines*, 125 F. 2d 551 (2nd Cir. 1942) cited *Davis* at pages 9 and 10 of his brief in support of the same contention petitioner is making here. The court, while making no reference to *Davis* in its opinion, refused to follow it but followed *Calhoun*. So did the court in *Nesbit* v. *Frederick Snare Corporation*, 96 F. 2d 535 (C. A. D. C. 1938) and so did the New York State Court in the case at bar.

Petitioner also contends (petition, pp. 19, 20) that *Calhoun*, because of the difference in the wording of the fee provision there, sustains his contention that his fee may be paid from other funds of the respondent. The wording in *Calhoun* proscribed payment or receipt by an attorney of "any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated" (253 U. S. 172). Petitioner tortuously argues that the use of

"in the aggregate" expressly precludes payment "from outside sources" and that this or some similar phrase is necessary to prohibit such payment. Neither this nor any similar phrase was used in this Act or in the acts in *Sutherland* or *Nesbit*, where the same argument petitioner now makes was urged and rejected. As Judge Knox pointed out in *Sutherland*, 43 F. Supp. 95-96, it is useless "to define and construe words and phrases in such manner as will frustrate what I believe to be the intention and deliberate purpose of Congress."

The soundness of this observation cannot be questioned. If an attorney can collect from other funds of the claimant either in *quantum meruit* or in contract, the limitation or prohibition has no effect and the intent of Congress is completely thwarted.

## Conclusion.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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